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No. 94-251

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In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

JUAN PAUL ROBERTSON

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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16 pp

TABLE OF AUTHORITIES

Cases:	Page
Allied-Bruce Terminix Cos. v. *Dobson*, No. 93-1001 (Jan. 18, 1995)	2
Chapman v. *United States*, 500 U.S. 453 (1991)	11
Fort Wayne Books, Inc. v. *Indiana*, 489 U.S. 46 (1989)	11
Gregory v. *Ashcroft*, 501 U.S. 452 (1991)	12
Gulf Oil Corp. v. *Copp Paving Co.*, 419 U.S. 186 (1974)	7
Hammer v. *Dagenhart*, 247 U.S. 251 (1918)	9
Harrison v. *PPG Industries, Inc.*, 446 U.S. 578 (1980)	13
Hodel v. *Virginia Surface Mining & Recl. Ass'n*, 452 U.S. 264 (1981)	13
Kolender v. *Lawson*, 461 U.S. 352 (1983)	10
McLain v. *Real Estate Board of New Orleans*, 444 U.S. 232 (1980)	3
NLRB v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)	6
NLRB v. *Reliance Fuel Oil Corp.*, 371 U.S. 224 (1963)	2, 4
Perez v. *United States*, 402 U.S. 146 (1971)	7
Perrin v. *United States*, 444 U.S. 37 (1979)	12
Polish National Alliance v. *NLRB*, 322 U.S. 643 (1944)	3, 4, 6, 11
Reves v. *Ernst & Young*, 113 S. Ct. 2050 (1993)	11
Russell v. *United States*, 471 U.S. 858 (1985)	2, 4, 5
Scarborough v. *United States*, 431 U.S. 563 (1977)	8, 11, 12
Smith v. *United States*, 113 S. Ct. 2050 (1993)	11
Summit Health, Ltd. v. *Pinhas*, 500 U.S. 322 (1991)	2, 3, 6
United States v. *Bass*, 404 U.S. 336 (1971)	8
United States v. *Culbert*, 435 U.S. 371 (1978)	5, 10, 12
United States v. *Darby*, 312 U.S. 100 (1941)	9
United States v. *Doherty*, 867 F.2d 47 (1st Cir.), cert. denied, 492 U.S. 918 (1989)	8, 9
United States v. *Feola*, 420 U.S. 671 (1975)	10

Cases—Continued: Page

United States v. *Frankfort Distilleries, Inc.*, 324 U.S. 293 (1945) 2
United States v. *Staszcuk*, 517 F.2d 53 (7th Cir.), cert. denied, 423 U.S. 837 (1975) 6, 7
United States v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944) 10
United States v. *Turkette*, 452 U.S. 576 (1981) 12
United States v. *X-Citement Video, Inc.*, 115 S. Ct. 464 (1994) 10
United States v. *Yermian*, 468 U.S. 63 (1984) 10
Wickard v. *Filburn*, 317 U.S. 111 (1942) 9

Constitution and statutes:

U.S. Const. Art. I, § 8, Cl. 3 (Commerce Clause) 1, 2, 4, 5, 6, 8, 10, 13
Hobbs Act, 18 U.S.C. 1951 ..... 5, 10
National Labor Relations Act, 29 U.S.C. 152(7) 3, 6
Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1, 84 Stat. 922-923 ..... 6, 7
§ 904(a), 84 Stat. 947 11
Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.* ..... *passim*
18 U.S.C. 1961 note 6, 11
Sherman Act, 15 U.S.C. 1 ..... 2, 3, 6, 10
18 U.S.C. 844(i) 4

Miscellaneous:

H.R. Rep. No. 1549, 91st Cong., 2d Sess. (1970) 2
S. Rep. No. 617, 91st Cong., 1st Sess. (1969) 7

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Respondent's central contention (Br. 10-11) is that the phrase "affecting commerce" does not invoke Congress's full power under the Commerce Clause, because it does not trigger application of a "class of activities" analysis. According to respondent (Br. 8-11), only when Congress itself specifies the class of activities that a statute regulates may courts consider the *aggregate* effect on commerce of the class's activities. When Congress does not explicitly invoke the "class of activities" doctrine, the statute requires that the activities in each case, considered in isolation, be "substantial." Respondent thus proposes that the "affecting commerce" rubric be reduced from its current position as invoking all of Congress's Commerce Clause authority to a middle

ground of uncertain scope "lying somewhere in a no-man's land between 'in commerce' and [a class-of-activities analysis]." *Allied-Bruce Terminix Cos.* v. *Dobson*, No. 93-1001 (Jan. 18, 1995), slip op. 9. That result would have the effect of "unnecessarily complicating the law and breeding litigation," *ibid.*, and is not supported by this Court's cases.

1. As this Court recently reaffirmed, the phrase "affecting commerce," which Congress used to describe the jurisdictional reach of RICO, is a term of art that signals Congress's "intent to exercise its Commerce Clause powers to the full." *Allied-Bruce Terminix Cos.* v. *Dobson*, slip op. 7 (citing *Russell* v. *United States*, 471 U.S. 858, 859 (1985)). Congress used that phrase in RICO with full awareness that it was invoking "the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause." H.R. Rep. No. 1549, 91st Cong., 2d Sess. 70 (1970) (quoting *NLRB* v. *Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963) (per curiam) (emphasis deleted)). See U.S. Br. 13-16. Contrary to respondent's contention (Br. 8-10), the class-of-activities analysis applies whenever Congress chooses to use its full constitutional authority; that analysis is simply a way to determine whether a particular activity affects commerce when measured by the full authority of Congress.

Respondent proposes (Br. 14-17) the Sherman Act, 15 U.S.C. 1, as a "model" for the jurisdictional inquiry under RICO. This Court has repeatedly emphasized, however, that "Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied; it 'exercised all the power it possessed.'" *United States* v. *Frankfort Distilleries, Inc.*, 324 U.S. 293, 298 (1945); see also *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. 322, 328-329 & n.10 (1991). And the "line of business" approach

that this Court has endorsed in Sherman Act cases necessarily looks beyond the activities of the parties immediately before the Court. See, *e.g.*, *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. at 332 (competitive significance of conduct "must be measured, not just by a particularized evaluation of [plaintiff's] own practice, but rather, by a general evaluation of the impact of the restraint on other participants and potential participants in the market from which he has been excluded"); *McLain* v. *Real Estate Board of New Orleans*, 444 U.S. 232, 242-243 (1980) (plaintiff need not prove that the challenged illegal practice, by itself, affected commerce). Indeed, respondent concedes that the Court's analysis in *Summit Health*, *supra*, "could be read to endorse a class-of-activities approach" in assessing the jurisdictional reach of the Sherman Act. Br. 16 n.13. To avoid that suggestion, respondent is compelled to argue that the approach of the Sherman Act cases—the "model" he proposes—should *not* be followed in interpreting RICO, because that approach "is uniquely appropriate to antitrust law." *Ibid.*

Contrary to respondent's argument that "the individual activities of the [RICO] enterprise" must be viewed in isolation (Br. 5), this Court's cases have applied the class-of-activities analysis to other statutes that (like RICO and the Sherman Act) involve "general prohibitions" (Br. 10). In *Polish National Alliance* v. *NLRB*, 322 U.S. 643 (1944), for example, the Court held that certain practices were proscribed by the National Labor Relations Act, 29 U.S.C. 152(7), because they "tend[ed] to lead to a labor dispute burdening or obstructing commerce." 322 U.S. at 648. In so holding, the Court first noted that when Congress legislates with respect to activities that "affect" or "obstruct" commerce, it manifests its purpose to bring those activities

"within the full sweep of its constitutional authority." 322 U.S. at 647. The Court then explained that while "Congress * * * left it to the Board to ascertain whether proscribed practices would in particular situations adversely affect commerce when judged by the full reach of the constitutional power," that question "is not to be determined by confining judgment to the quantitative effect of the activities immediately before the Board. Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce." *Id.* at 648. The Court made the same point (and quoted from *Polish National Alliance* at length) in *NLRB* v. *Reliance Fuel Oil Corp.*, 371 U.S. at 226-227, the case that was cited in the House Report that accompanied RICO to illustrate the constitutional significance of the phrase "affecting commerce." H.R. Rep. No. 1549, *supra*, at 70.

More recently, the Court applied the same "class-of-activities" analysis in *Russell* v. *United States*, 471 U.S. 858 (1985). The defendant in that case attempted to set fire to a two-unit apartment building. He was convicted under 18 U.S.C. 844(i), which prohibits the arson or attempted arson of any building "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." That statute, like RICO, requires that a nexus with commerce be proven in each prosecution. This Court nonetheless unanimously affirmed the conviction, rejecting the defendant's claim that the building he attempted to burn did not "affect[] interstate or foreign commerce." The Court explained that the phrase "affecting commerce" expresses Congress's intent "to exercise its full power under the Commerce Clause," 471 U.S. at 859 & n.4, and noted that

the government had established that the defendant used the building as rental property. *Id.* at 859, 862. Because "the local rental of an apartment unit is merely an element of a much broader commercial market in rental properties," and because Congress has the power "to regulate the class of activities that constitute the rental market for real estate," the Court concluded that the property "was * * * being used in an activity affecting commerce." *Id.* at 862.[1]

The lower courts have applied the same analysis to the Hobbs Act, 18 U.S.C. 1951, which also extends to the limits of the Commerce Clause in prohibiting any extortion that obstructs or affects commerce, see, *e.g.*, *United States* v. *Culbert*, 435 U.S. 371, 373 (1978), and which also requires that the jurisdictional nexus be proved in every case. As Justice Stevens explained in language that is equally applicable to the concerns that prompted the enactment of RICO:

> [C]ongressional concern was not merely a matter of providing federal protection to each of the "relatively small shops" being victimized, but rather reflected the legislative judgment that these entrepreneurs, in the aggregate, represented a component of industry of sufficient importance to merit federal protection. The concern which gave rise to the statute is marketwide. Thus, although enforcement necessarily proceeds on a case-by-case basis, our evaluation of both the intent of Congress and its power to implement that intent, requires more than a

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[1] *Russell* also disposes of respondent's suggestion that a class-of-activities analysis is possible only when Congress itself defines a *specific* "industry or practice in the statute at issue." Br. 13. The statute at issue in *Russell* did not specify the rental market, or any other industry, as the relevant "class."

> consideration of the consequences of the particular transaction disclosed by this record; it requires an identification of the consequences of the class of transactions of which this is but one example.

United States v. *Staszcuk*, 517 F.2d 53, 57-58 (7th Cir.) (en banc), cert. denied, 423 U.S. 837 (1975), cited with approval in *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. at 331 n.11. A statute that serves such purposes, "[l]ike the Sherman Act, * * * parallels the central purpose of the Commerce Clause itself" and therefore "must receive an expansive construction." 517 F.2d at 58.

Respondent attempts to distinguish *Polish National Alliance*, *supra*, on the ground that "Congress set forth specific findings" before it enacted the National Labor Relations Act (NLRA). Br. 12 n.7. Respondent cites no authority that requires Congress to make "specific findings" in the manner of an administrative agency (and he elsewhere contends that the requisite findings may be "explicit or implicit," Br. 10). In any event, the "specific findings" supporting the NLRA were simply to the effect that strikes and other forms of industrial strife tend to impede commerce. See *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 22-23 & n.2 (1937). The Statement of Findings and Purpose that prefaced RICO is, at least, as "specific." See Pub. L. No. 91-452, § 1, 84 Stat. 922-923, 18 U.S.C. 1961 note. Congress there made quite clear its view that the illegal activities of organized crime "annually drain[] billions of dollars from America's economy," that the money "is used to infiltrate and corrupt legitimate business," and that those activities "weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the

domestic security, and undermine the general welfare of the Nation and its citizens." *Ibid.*

Respondent contends that, unlike RICO, the statute at issue in *Russell is* a class-of-activities statute, because the legislative history indicated that Congress "intended for the statute to cover almost all buildings." Br. 13-14 n.9. That does not distinguish RICO, however, since Congress intended to cover all "enterprises," and, as we have demonstrated (U.S. Br. 14-16), was particularly concerned about the "small or marginal businessman who is most easily subject to invasion by organized crime." S. Rep. No. 617, 91st Cong., 1st Sess. 77 (1969).

Finally, respondent relies (Br. 10-11) on the Court's statement in *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 197 n.12 (1974), that when Congress requires proof of a nexus with commerce in each case, the jurisdictional inquiry "differs significantly from that required when Congress itself has defined the specific persons and activities that affect commerce." The difference in the inquiry, however, does not assist respondent. When Congress defines the regulated class in the statute, it dispenses with the need for *any* proof of a nexus with interstate commerce in the specific case. See, *e.g.*, *Perez* v. *United States*, 402 U.S. 146 (1971), cited by *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. at 197 n.12. That is not so when Congress uses the term of art "affecting commerce," but the nexus to commerce in a particular case may still be established by any permissible means of invoking Congress's commerce power, including the class-of-activities analysis. See, *e.g.*, *United States* v. *Staszcuk*, 517 F.2d at 59-60 (while courts may not "disregard the statutory language which requires the prosecutor to prove some connection with interstate commerce in every case," jurisdiction "is

justified by the harmful consequences of the class of transactions to which the individual extortion belongs").

2. In this case, contrary to respondent's claim (Br. 20-23), the evidence readily established that the Alaskan gold mine (the RICO "enterprise") into which respondent invested racketeering proceeds had the requisite effect on commerce. First, the activities of the mine used the channels of interstate commerce. See *Scarborough* v. *United States*, 431 U.S. 563, 571, 575, 577 (1977) (statute outlawing possession of firearm "in commerce or affecting commerce" satisfied when firearm was, "at some time, in interstate commerce," even if that occurred before the defendant acquired it; Congress's use of the phrase "affecting commerce" invokes full Commerce Clause power and makes clear that it "intended no more than a minimal nexus requirement"); *United States* v. *Bass*, 404 U.S. 336, 350 (1971) (same, with respect to felon's receipt of a gun "in or affecting commerce"). As we have demonstrated (U.S. Br. 18-19, 22-23), respondent's gold mine purchased equipment and hired employees outside of Alaska, and used the interstate mails and the wires to receive directions and monetary support from respondent. Nothing more was required to meet the requirements of RICO and the Commerce Clause. As the court explained in *United States* v. *Doherty*, 867 F.2d 47, 68 (1st Cir.) (Breyer, J.), cert. denied, 492 U.S. 918 (1989), the "minimal" effect on commerce demanded by RICO is satisfied by any use of the channels of interstate commerce, such as when "supplies used [by the enterprise] originated out of state," when "interstate telephone calls" were placed by the enterprise, or when

the activities of the enterprise prevented out-of-state job applicants from being hired by an employer.[2] *Ibid.*

Second, the jurisdictional requirement of RICO was independently satisfied in this case by the gold mine's *intrastate* activities (*i.e.*, its sale of at least $200,000 in gold), because they were part of a class of activities that in the aggregate substantially affects commerce. See, *e.g. Wickard* v. *Filburn*, 317 U.S. 111, 127-128 (1942). Respondent does not dispute that, considered in the aggregate with like activities across the country, the activities of his gold mine affected commerce. Br. 10. Nor does he dispute that the practical consequence of the "class of activities" analysis is that Congress may constitutionally regulate even "trivial" instances of the class. *Id.* at 9. Because, contrary to respondent's claim (Br. 22), Congress need not define the regulated class in the statute to justify the use of the "class of activities" analysis, the jurisdictional nexus to interstate commerce was satisfied in this case by the aggregate

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[2] Respondent asserts that the mail and telecommunications may not support federal jurisdiction unless "they are used as instruments of crime." Br. 22 n.22 (internal quotation marks omitted). He cites no authority, however, for the proposition that Congress may regulate an activity based on its employment of the mail or telephones only when those means of communications are used for criminal purposes. This Court's cases are to the contrary. See, *e.g.*, *United States* v. *Darby*, 312 U.S. 100, 113-115 (1941). Indeed, respondent's argument recalls the reasoning of *Hammer* v. *Dagenhart*, 247 U.S. 251 (1918), where the Court held that "Congressional power to prohibit interstate commerce is limited to articles which in themselves have some harmful or deleterious property." *United States* v. *Darby*, 312 U.S. at 116. As this Court explained in *Darby* (when it overruled *Dagenhart*), that "distinction * * * was novel when made and unsupported by any provision of the Constitution—[it] has long since been abandoned." *Ibid.*

commercial impact of the gold mining industry that encompasses respondent's mine.

3. Respondent also contends that a broad jurisdictional nexus is "inappropriate for delineating criminal liability and would present the possibility of prosecutorial abuse," because it could render the statute void-for-vagueness under due process standards. Br. 12-13 (citing *Kolender* v. *Lawson*, 461 U.S. 352 (1983)). RICO, however, is not the first statute in which Congress has exercised its full authority under the Commerce Clause in the criminal context. See, *e.g.*, *United States* v. *Culbert*, *supra* (Hobbs Act); *United States* v. *South-Eastern Underwriters Association*, 322 U.S. 533 (1944) (Sherman Act); *United States* v. *Darby*, 312 U.S. 100 (1941) (Fair Labor Standards Act). Yet this Court has never suggested that a broad jurisdictional reach raises vagueness concerns. A vagueness argument is particularly misplaced, because federal criminal statutes generally do not require that the defendant harbored "anti-federal scienter." *United States* v. *Staszcuk*, 517 F.2d at 59. Rather, "the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute," *United States* v. *Feola*, 420 U.S. 671, 676-677 n.9 (1975), since "[t]he concept of criminal intent does not extend so far as to require that the actor understand not only the nature of his act but also its consequence for the choice of a judicial forum." *Id.* at 685; see *United States* v. *X-Citement Video, Inc.*, 115 S. Ct. 464, 469 n.3 (1994); *United States* v. *Yermian*, 468 U.S. 63, 68-69 (1984).[3]

[3] In any event, RICO is a particularly implausible candidate for a vagueness claim, because no one can be convicted of violating RICO unless he commits or agrees to the commission of at least two specified felonies and satisfies other requirements. As this Court noted in the context of a prosecution under a similar state law, "it would seem that the RICO statute in inherently *less* vague than any [law defining the predicate felonies]: a prosecution under the RICO law will be possible only when all the elements of [the predicate] offense are present, and then some." *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 59 n. 7 (1989).

Respondent also appears to suggest that a more limited reading of RICO is required by the rule of lenity. Br. 26 n. 25. The rule of lenity has no application here. That principle does not displace the normal tools of statutory construction in determining Congress' intent. See *Reves* v. *Ernst & Young*, 113 S. Ct. 1163, 1172 & n.8 (1993). As this Court has noted, the rule of lenity becomes applicable only if, "after seizing everything from which aid can be derived, the Court is left with an ambiguous statute." *Smith* v. *United States*, 113 S. Ct. 2050, 2059 (1993) (internal quotation marks and brackets omitted). Here, Congress conveyed its purpose quite clearly by using a term of art that invokes "the full sweep of its constitutional authority." *Polish National Alliance* v. *NLRB*, 322 U.S. at 647. There is accordingly no "grievous ambiguity or uncertainty," *Chapman* v. *United States*, 500 U.S. 453, 467-468 (1991) (internal quotation marks omitted); see also *Scarborough* v. *United States*, 431 U.S. at 577, calling for the application of lenity.

4. Finally, respondent suggests (Br. 25) that a restrictive interpretation of RICO is necessary "to preserve the delicate balance between state and federal power." Nothing in RICO, however, deprives States of authority to prosecute conduct that violates their laws. See Pub. L. No. 91-452, § 904(b), 84 Stat. 947, 18 U.S.C. 1961 note ("[n]othing in this title shall supersede any

provision of * * * State * * * or other law imposing criminal penalties * * * in addition to those provided for in this title"). As this Court has noted, "under RICO, the States remain free to exercise their police powers to the fullest constitutional extent in defining and prosecuting crimes within their respective jurisdictions." *United States* v. *Turkette*, 452 U.S. 576, 586 n.9 (1981).

Moreover, the principle that criminal statutes should be construed so as to avoid invading areas of traditional state concern "only appl[ies] 'when we are uncertain about the statute's meaning,'" *United States* v. *Culbert*, 435 U.S. at 379 (quoting *Scarborough* v. *United States*, 431 U.S. at 577), and that consideration is therefore inappropriate where "Congress has conveyed its purpose clearly." *United States* v. *Culbert*, 435 U.S. at 379; see also *Perrin* v. *United States*, 444 U.S. 37, 50 (1979). As this Court noted in *United States* v. *Turkette*, *supra*, Congress left no doubt that it intended to alter the federal-state balance when it enacted RICO: "[T]he language of [RICO] and its legislative history indicate that Congress was well aware that it was entering a new domain of federal involvement through the enactment of this measure. Indeed, the very purpose of the Organized Crime Control Act of 1970 was to enable the Federal Government to address a large and seemingly neglected problem. The view was that existing law, state and federal, was not adequate to address the problem, which was of national dimensions." 452 U.S. at 586.[4]

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[4] Respondent errs in suggesting (Br. 19 n.18) that the "plain statement" requirement of *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), is applicable to RICO's regulation of structured and complex criminal conduct. In any event, Congress's use of the phrase "affecting commerce" and the findings accompanying RICO leave no doubt that Congress intended to regulate all criminal activities involving enterprises within the reach of the Commerce Clause power.

In the end, respondent's argument reduces to questioning the wisdom of Congress in invoking its full constitutional authority to deal with matters that respondent believes can adequately be handled by State authorities. Br. 28-29 & n.26. That is "an argument to be addressed to Congress, not to this Court." *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 593 (1980). For "[t]he short answer to [it] is that the effectiveness of existing laws in dealing with a problem identified by Congress is ordinarily a matter committed to legislative judgment. Congress considered the effectiveness of existing legislation and concluded that additional measures were necessary." *Hodel* v. *Virginia Surface Mining & Recl. Ass'n*, 452 U.S. 264, 283 (1981). There is no room for judicial inquiry into the wisdom of that choice.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FEBRUARY 1995